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Filing date: **07/22/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91184213
Party	Defendant Direct Access Technology Inc
Correspondence Address	MICHAEL C. OLSON 1400 BRISTOL STREET N SUITE 270 NEWPORT BEACH, CA 92660 UNITED STATES molson@lawyer.com
Submission	Opposition/Response to Motion
Filer's Name	Michael C. Olson
Filer's e-mail	molson@lawyer.com
Signature	/MCO/
Date	07/22/2009
Attachments	opposition.motion.momo.chen.pdf ( 20 pages )(508487 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**In the matter of Trademark Application Serial No. 78914975  
For the mark, METAL GEAR**

<b>Galaxy Metal Gear, Inc.</b>	)	
	)	
<b>Opposer</b>	)	<b>Opposition No. 91184213</b>
	)	
	)	
v.	)	
	)	<b>OPPOSITION TO OPPOSER'S</b>
	)	<b>MOTION TO OFFER INTO</b>
	)	<b>EVIDENCE DEPOSITION</b>
	)	<b>TRANSCRIPT OF MOMO CHEN</b>
<b>Direct Access Technology, Inc.</b>	)	
	)	
<b>Applicant</b>	)	

**1. INTRODUCTION**

Applicant seeks to register the mark METAL GEAR for in International Class 009, for use on external computer hard drive enclosures. Opposer has filed this opposition on only two grounds, i.e. that the Applicant committed fraud by falsely claiming ownership of the mark and that the mark is merely descriptive of the goods. Opposer makes its claim of fraud, even though Applicant created the METAL GEAR mark for its enclosures, had the enclosures made simultaneously by four

Opposition No. 91184213

different manufacturers, owned the tooling for manufacturing the enclosures and had its name printed on the packaging as the originator of the product. Opposer continues to make its claim that the mark is merely descriptive, even though its designated corporate representative admitted that the mark does not describe, in any fashion, the goods involved.

After these proceedings were filed, the parties timely served initial disclosures. Opposer has never supplemental its disclosures since the initial service. As seen from Exhibit “A,” Momo Chen was never disclosed as a witness in Opposer’ initial disclosures. The deposition notice of Momo Chen was served by Opposer on or about October 30, 2008, by mail, setting the deposition for November 13, 2008. (See attached Exhibit “B”). Minimal notice of the deposition was given and there was no opportunity to conduct discovery regarding Ms. Chen prior to the deposition because of the short notice.

Opposer is a customer of Ms. Chen. (Depo of Momo Chen, page 35, lines 21-22) (“Is Galaxy still a customer of yours? A. For my current company, yes.”) Opposer arranged for Ms. Chen to come out to give a deposition, paying all her travel expenses plus a weeks salary. (Depo of Ms. Chen, page 32, lines 1-18) It is interesting to note that the agreement was that Ms. Chen would only come out for a discovery deposition and not to give testimony during the trial. (Depo of Ms. Chen, page 32, lines 23-25) (“Q. And your presence here, is that an agreement just for a deposition, not for trial? A. Yes, just for the deposition. Correct.”)

Perhaps because Opposer is aware that Applicant has discovered documentary evidence to impeach Ms. Chen, Opposer does not wish her to be subject to further cross-examination. In any event, rather than take her deposition by written question, which would not require Ms. Chen’s

appearance in the US, Opposer brings this motion arguing there is good cause for allowing the discovery deposition to be used in lieu of testimony at trial.

**2. THE MOTION SHOULD BE DENIED BECAUSE APPLICANT IS PREJUDICED BY THE USE OF THE DISCOVERY DEPOSITION**

As seen, the Opposer did not disclose Ms. Chen's identity in its Initial Disclosures. The deposition was taken on only 14 days notice, which is minimal notice under the circumstances. Given the 14 days notice, there was no opportunity to do formal discovery regarding Ms. Chen's identity or expected testimony. As stated by the Board in *Kairos Institute of Sound Healing, LLC v. Doolittle Gardens, LLC*, 88 USPQ2d 1541 (TTAB 2008):

“A party may seek to strike any testimony or portions of testimony, whether or not from an expert, when related disclosures were untimely, improper or inadequate.”

Final Rule 72 F.R. at 42256

As a final matter, the parties are reminded that the provision of Fed. R. Civ. P. 26(e) regarding the duty to supplement or amend disclosures applies to inter partes proceedings before the Board (see Final Rule, 72 F.R. at 42254), and that the Board's standard protective order is applicable in this proceeding pursuant to Trademark Rule 2.116(g).”

Since the deposition was taken by Opposer without any opportunity for Applicant to do discovery or properly prepare for the deposition, Applicant was at an extreme disadvantage at the time the deposition was taken. Opposer, of course, was not disadvantaged since it took the deposition

knowing exactly what information it wanted for its case. The Applicant would be prejudiced if the discovery deposition were allowed to be used by Opposer in proving its case. The disadvantage Applicant suffered by not being notified of the witness' identity in Opposers' Initial Disclosures and not being allowed to conduct discovery related to Ms. Chen prior to the deposition can only be cured if the Opposer is forced to re-depose the witness. Accordingly, the Board should deny Opposer's motion for leave to use the discovery deposition of Momo Chen.

**3. OPPOSER HAS NOT SHOWN GOOD CAUSE FOR LEAVE TO USE THE  
DISCOVERY DEPOSITION OF MOMO CHEN**

Opposer argues that it has good cause to use the discovery deposition as evidence at the trial of this matter. In fact, other than showing that the witness is in Taiwan, Opposer offers no other evidence in support of its claim.

There is no good cause for allowing the discovery deposition to be used. First, Opposer has not shown that it has exhausted other means of obtaining the witnesses testimony. For example, the Opposer has not shown that the witness refuses to submit to a deposition by written question. Opposer has only shown that the witness does not want to come to the US for the trial. Until other alternative means are shown to be unavailable, Opposer has not shown good cause for the relief requested.

Second, the Opposer should be deemed to control the witness because there is a business relationship between the two. Further, the witness has, in the past, agreed to come here at the request of the Opposer to give testimony. There is no showing that the Opposer actually requested the

witness to come again, with a promise of reimbursement of expenses. Given the business relationship between Opposer and the witness, the prior agreement to assist the Opposer, and the benefit that arises to the Opposer in not having its chief witness re-deposed, the Board can and should infer that the witness is deliberately being requested not to come to the US for testimony.

Third, the evidence shows that the Opposer and the witness had an agreement back at the time the deposition was taken that the witness would not appear for trial. The Board show infer that the Opposer has acted in bad faith. The Opposer first failed to disclose the witnesses identity in its Initial Disclosures. It failed to amend its Initial Disclosures. Then Opposer entered into an agreement with the witness to have the witness come to the US, at Opposer's expense, with the understanding that the witness would deliberately not return for trial. Thereafter, the Opposer noticed the deposition with only about two weeks notice, such that Applicant was precluded to conducting any discovery regarding the witness prior to the testimony. While such conduct would not be a problem if the deposition was for discovery purposes only, where the Opposer takes the deposition knowing it would be making a motion to use the deposition at trial, it is prejudicial to the Applicant and is clearly bad faith by the Opposer.

#### **4. CONCLUSION**

The motion should be denied. If the Board assumes the worst, i.e. that Opposer deliberately failed to identify the witness in its Initial Disclosures, took the deposition on shortened notice with an agreement with the witness that the witness would absent herself from the trial by refusing to come to the US, it smacks of bad faith by Opposer. Clearly, under these circumstances denial of the

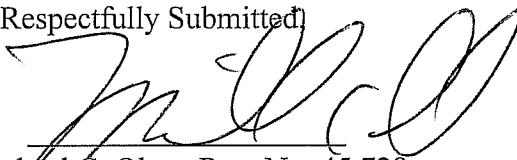
motion is proper.

If the Board gives the benefit of the doubt to Opposer, the motion should still be denied as the Applicant is prejudiced through the failure of Opposer to disclose the witness in its Initial Disclosures, the setting of the deposition on shortened notice such that Applicant could not properly prepare for the deposition and the failure of Opposer to prove that the witness would not submit to other methods of testifying, such as a deposition on written questions.

Under either circumstance, the Opposer is not entitled to the relief sought in the motion. Accordingly, the Board should deny the motion.

July 22, 2009

Respectfully Submitted

A handwritten signature in black ink, appearing to read 'M. Olson', written over a horizontal line.

Michael C. Olson Reg. No. 45,728

LAW OFFICE OF MICHAEL C. OLSON, P.C.  
1400 Bristol Street N., Ste 270  
Newport Beach, California 92660  
Tel. (949) 442-8940  
Fax. (949) 442-8935  
email: [molson@lawyer.com](mailto:molson@lawyer.com)


Attorneys for Applicant  
Direct Access Technology, Inc.

Opposition No. 91184213

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing **OPPOSITION TO OPPOSER'S MOTION TO OFFER INTO EVIDENCE DEPOSITION TRANSCRIPT OF MOMO CHEN** was served on Jen-Feng Lee, counsel for applicant on this 22nd day of July, 2009 by depositing a copy of the same in the United States mail, first class postage prepaid, addressed to:

Jen-Feng Lee, Esq.  
World Esquire Law Firm, LLP  
80 South Lake Avenue, Ste 708  
Pasadena, CA 91101  
Telephone: (626) 795-5555  
Facsimile: (626) 795-5533

  
\_\_\_\_\_  
Michael C. Olson



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**In the matter of Trademark Application Serial No. 78914975  
For the mark, METAL GEAR**

<b>Galaxy Metal Gear, Inc.</b>	)	
	)	<b>Opposition No. 91184213</b>
<b>Opposer</b>	)	
	)	
	)	
<b>v.</b>	)	
	)	<b>DECLARATION OF MICHAEL C.</b>
	)	<b>OLSON</b>
<b>Direct Access Technology, Inc.</b>	)	
	)	
<b>Applicant</b>	)	

**DECLARATION OF MICHAEL C. OLSON**

I, Michael C. Olson, declare as follows:

1. I am the attorney for the Applicant, Direct Access Technology. I have personal knowledge of the matters set forth in this declaration and, if called as a witness, would truthfully and competently testify to the following.

2. Attached as Exhibit "A" is a true and correct copy of Opposer's Initial Disclosures received by this office. Opposer never served an Amended Initial Disclosure identifying Momo

Opposition No. 91184213

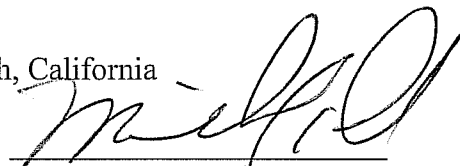
Chen as a potential witness prior to her deposition.

3. Attached as Exhibit "B" is a true and correct copy of Opposer's Notice of Deposition of Momo Chen received by this office.

4. Applicant would be prejudiced if the Board were to allow the use of the discovery deposition of Momo Chen at the trial. Applicant had little notice of the deposition of Momo Chen, had not conducted any discovery regarding Momo Chen prior to the date of the discovery deposition. Since the date of her deposition, Applicant has discovered documents which impeach a portion of her testimony regarding the dates she worked at DataStor.

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Executed on July 22, 2009 at Newport Beach, California

  
Michael C. Olson

## **EXHIBIT “A”**

1                   **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
2                   **BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

3  
4   In the matter of Application Serial No.: 78914975

5   Filed:           6/22/2006

6   Mark:           METAL GEAR

7   GALAXY METAL GEAR, INC.,

Opposition No.: 91184213

8                   Opposer,

9                   vs.

10   DIRECT ACCESS TECHNOLOGY, INC.

Action filed: May 20, 2008

11                   Applicant.

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13  
14                   **OPPOSER'S INITIAL DISCLOSURES**

15  
16           Pursuant to 37 CFR Part 2 of the Code of Federal Regulations, Opposer, Galaxy Metal  
17   Gear, Inc. ("Galaxy" hereinafter), by its attorneys of record, hereby provide the following  
18   initial disclosures. The disclosures are based on documentation and information that are  
19   currently and reasonably available to Galaxy at this time. Galaxy reserves its right to modify  
20   these disclosures based on discovery, investigation, or any new or revised information that is  
21   made available to Galaxy or is or may be discovered.  
22

23  
24  
25           A.     KNOWN WITNESSES

26           On information and belief, Galaxy provides the name and, if known, the address and  
27   telephone number of each individual likely to have discoverable information that Galaxy may  
28

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Opposer's Initial Disclosures

1 use to support Galaxy's claims or refute Applicant's defenses unless solely for impeachment, as  
2 follows:  
3

- 4
- 5 1) Antonio Tan  
6 c/o Kenneth Tanji, Jr.  
7 WorldEsquire Law Firm LLP  
8 80 South Lake Avenue, #708  
9 Pasadena, CA 91101  
10 Telephone: (626) 795-5555  
11 Fax: (626) 795-5533  
12

13 Antonio Tan is an officer of Galaxy. Tan will provide testimony and regarding his  
14 knowledge of the operations of Galaxy, including but not limited to the corporate structure and  
15 sales and marketing of products by Galaxy; the sales and marketing of products by DataStor  
16 Technology; and the sales and marketing of products by Applicant.  
17  
18

- 19
- 20 2) Gary Ching  
21 c/o Kenneth Tanji, Jr.  
22 WorldEsquire Law Firm LLP  
23 80 South Lake Avenue, #708  
24 Pasadena, CA 91101  
25 Telephone: (626) 795-5555  
26 Fax: (626) 795-5533  
27  
28

1 Gary Ching is an officer of Galaxy. Gary Ching will provide testimony and regarding  
2 his knowledge of the operations of Galaxy, including but not limited to the corporate structure  
3 and sales and marketing of products by Galaxy; the sales and marketing of products by  
4 DataStor Technology; and the sales and marketing of products by Applicant.  
5

6  
7 3) Geoffrey Ching  
8 c/o Kenneth Tanji, Jr.  
9 WorldEsquire Law Firm LLP  
10 80 South Lake Avenue, #708  
11 Pasadena, CA 91101  
12 Telephone: (626) 795-5555  
13 Fax: (626) 795-5533  
14  
15

16 Geoffrey Ching is an officer of Galaxy. Geoffrey Ching will provide testimony and  
17 regarding his knowledge of the operations of Galaxy, including but not limited to the corporate  
18 structure and sales and marketing of products by Galaxy; the sales and marketing of products  
19 by DataStor Technology; and the sales and marketing of products by Applicant.  
20

21  
22 4) Anderson Wang  
23 DataStor Technology  
24 4F, No. 393, Jixian Road  
25 Luzhou City, Taipei County 247, Taiwan (R.O.C.)  
26 Telephone: 886-2-2285-9120  
27 Fax: 886-2-2285-9011  
28

1 Anderson Wang is an officer of DataStor. Wang will provide testimony and regarding  
2 his knowledge of the operations of DataStor, including but not limited to the corporate structure  
3 and sales and marketing of products by DataStor; the sales and marketing of products by  
4 Galaxy; and the sales and marketing of products by Applicant.

5  
6 Discovery and investigation is continuing for other witnesses that have knowledge of  
7 relevant matters.

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9  
10 B. DOCUMENTS AND THINGS

11 Galaxy identifies the following documents and things, as defined by the Evidence Code,  
12 that are currently in its possession, custody, or control and that Galaxy may use to support  
13 Galaxy's claims or refute Applicant's defenses unless solely for impeachment, as follows:  
14

15  
16 1) Documents pertaining to the registration of the trademark "Metal Gear" by  
17 Applicant.

18 2) Documents pertaining to the registration of other trademarks similar to "Metal  
19 Gear," including but not limited to "Metal Gear," "Tune Gear," "Yukon Gear & Axle," "Pet  
20 Gear Inc.," "Metal Shop,"  
21

22 Discovery and investigation is continuing for other documents that are in the custody  
23 and control of other parties and entities.  
24

25  
26 C. DAMAGES

27 None. Galaxy is not seeking monetary damages in this proceeding.  
28

1 D. INSURANCE

2 There is no liability insurance policy covering Galaxy for the claims in this action.  
3

4  
5  
6 **Dated:** August , 2008

Respectfully submitted,

/ktanji/

WorldEsquire Law Firm  
Jen-Feng (Jeff) Lee  
Attorneys for Opposer,  
Galaxy Metal Gear Inc.  
WorldEsquire Law Firm  
80 S. Lake Ave., #708  
Pasadena, CA 91101  
Tel: 626-795-5555  
Fax: 626-795-5533



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## CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a copy of the foregoing Applicant's Answer to Notice of Opposition was served on the Opposer by mailing a true copy thereof by first class mail, postage prepaid to the following address on August 28, 2007.

**Michael Olson, Esq.**  
**Law Office of Michael C. Olson**  
**1400 Bristol St. N.**  
**Suite 270**  
**Newport Beach, CA 92660**

/jfllee/

---

Jen-Feng Lee

---

**Opposer's Initial Disclosures**

## **EXHIBIT “B”**

1                   **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
2                   **BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

3  
4   In the matter of Application Serial No.: 78914975

5   Filed:           6/22/2006

6   Mark:           METAL GEAR

7   GALAXY METAL GEAR, INC.,

8                   Opposer,

9                   vs.

10   DIRECT ACCESS TECHNOLOGY, INC.

11                   Applicant.

Opposition No.: 91184213

Action filed: May 20, 2008

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13  
14                   **NOTICE OF DEPOSITION OF MOMO CHEN**

15  
16                   PLEASE TAKE NOTICE that pursuant to Rule 30 of the Federal Rules of Civil  
17   Procedure, Opposer Galaxy Metal Gear, Inc., will take the deposition of independent witness  
18   Momo Chen at the following date, time, and site:

19  
20  
21                   Date:           November 13, 2008

22                   Time:           10:00 a.m.

23                   Site:           WorldEsquire Law Firm LLP

24                                   80 South Lake Avenue, #708

25                                   Pasadena, CA 91101  
26  
27  
28

1 This deposition will be taken upon oral examination before a certified court reporter in  
2 and for the County of Los Angeles. This deposition will continue day to day until completed,  
3 Sundays and holidays excluded and upon counsels' agreement to schedule further sessions.  
4

5  
6  
7  
8 **Dated:** October<sup>30</sup>, 2008

Respectfully submitted,

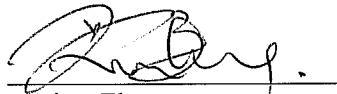
WorldEsquire Law Firm  
Jen-Feng (Jeff) Lee  
Kenneth Tanji, Jr.  
Attorneys for Opposer,  
Galaxy Metal Gear Inc.  
WorldEsquire Law Firm  
80 S. Lake Ave., #708  
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## CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a copy of the foregoing Notice of Deposition of Momo Chen was served on the Opposer by mailing a true copy thereof by first class mail, postage prepaid to the following address on October 30, 2008.

**Michael Olson, Esq.**  
**Law Office of Michael C. Olson**  
**1400 Bristol St. N.**  
**Suite 270**  
**Newport Beach, CA 92660**

  
Krisy Zhang